The Necessity Defense and Climate Change: A Climate Change Litigant's Guide

Joseph Rausch*

* J.D., Columbia Law School, Class of 2018. I would like to thank Professor Michael Gerrard for his guidance throughout the entire note writing process. In addition, I would also like to thank Ted Hamilton of the Climate Defense Project for providing me with hard to retrieve court documents and early access to a draft of a recent article he co-authored with Professor Lance N. Long that was influential in helping me write this piece.

INTRODUCTION

The scientific certainty of anthropogenic climate change continues to grow. The United States Global Change Research Program ("USGCRP")[1] concluded in its Fourth National Climate Change Assessment "that it is *extremely likely* that human influence has been the dominant cause of the observed warming since the mid-20th century" and that "there are no convincing alternative explanations supported by the extent of the observational evidence."[2] In a recent draft of the National Climate Assessment, the USGCRP suggests that "[g]lobal warming is affecting the United States more than ever, and the impacts . . . are expected to increase."[3] Therefore, the need to combat climate change is more pressing now than ever.

However, even with growing scientific certainty, there are still those who wish to disregard the importance of climate change. The arguably most notable individual to do so is the current President of the United States. In his first year in office, President Donald Trump dropped climate change from the national security strategy[4] and began the process of removing the United States from the Paris Climate Change Accord.[5] In addition, the President made a point to both reduce the number of regulations issued and

1. The USGRCP is a program that was established "'to assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change.'" *Legal Mandate*, U.S. GLOBAL CHANGE RES. PROGRAM, https://www.globalchange.gov/about [https://perma.cc/GH93-HTMY] (quoting 15 U.S.C. § 2931(d) (2018)) (last visited Apr. 20, 2019).

2. 1 U.S. GLOB. CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 35 (Donald J. Wuebbles et al. eds., 2017) (emphasis in original) [hereinafter USGCRP REPORT]. The USGRCP is by no means the only organization coming to this conclusion. Institutions such as NASA provide further support for the scientific certainty of climate change. *Scientific Consensus: Earth's Climate is Warming*, NASA: GLOBAL CLIMATE CHANGE (Apr. 19, 2019), https://climate.nasa.gov/scientific-consensus/ [https://perma.cc/D8F3-EG53].

3. Henry Fountain & Brad Plumer, *What the Climate Report Says About the Impact of Global Warming*, N.Y. TIMES (Nov. 3, 2017), https://www.nytimes.com/2017/11/03/climate/climate-change-impacts.html [https://perma.cc/T63G-AVTA].

4. Julian Borger, *Trump Drops Climate Change from US National Security Strategy*, THE GUARDIAN (Dec. 18, 2017, 11:06 PM), https://www.theguardian.com/us-news/2017/dec/18/trump-drop-climate-change-national-security-strategy [https://perma.cc/G4WA-6542].

5. Rob Crilly, *Donald Trump Pulls US Out of Paris Climate Accord to 'Put American Workers First'*, THE TELEGRAPH (June 2, 2017, 7:44 AM), http://www.telegraph.co.uk/news/2017/06/01/trump-pull-paris-accord-seek-better-deal/ [https://perma.cc/4EPE-B3XT].

funding for the Environmental Protection Agency ("EPA").[6] As a result, those who wish to combat climate change, at least for the next two years, will need to do so without the aid of the executive branch.

Outside of petitioning the executive branch directly, which has been used by environmentalists in the past, another technique environmentalist can utilize is civil disobedience.[7] Civil disobedience is defined as "illegal public protest, [that is] non-violent in character."[8] Examples of such activity include "trespassing on government property, blocking access to buildings, or engaging in disorderly conduct."[9] Civil disobedience signifies disagreement with public policies that individuals feel are not being properly addressed through the normal political channels.[10]

6. Coral Davenport, *Trump Budget Would Cut E.P.A. Science Programs and Slash Cleanups*, N.Y. TIMES (May 19, 2017), https://www.nytimes.com/2017/05/19/climate/trump-epa-budget-superfund.html [https://perma.cc/G9VM-36FN]; Brady Dennis & Juliet Eilperin, *EPA Remains Top Target with Trump Administration Proposing 31 Percent Budget Cut*, WASH. POST (May 23, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/05/22/epa-remains-top-target-with-trump-administration-proposing-31-percent-budget-cut/?utm_term=.1c8f9f27d480 [https://perma.cc/HZ6M-PGHL]. While Congress seemed to resist such cuts originally, the most recent budget proposal has a proposed cut of $528 million for EPA. *See* Jennifer A. Dlouhy, *Lawmakers Vow to Stop Trump's EPA Cuts*, BLOOMBERG: POL. (Jun 15, 2017, 3:28 PM), https://www.bloomberg.com/news/articles/2017-06-15/trump-spurs-bipartisanship-as-lawmakers-vow-to-stop-his-epa-cuts [https://perma.cc/F2YV-66H6]; Fred Krupp, *EPA Cuts Could Risk a Public Health Emergency*, CNN (Dec. 16, 2017, 8:46 PM), http://www.cnn.com/2017/12/16/opinions/epa-cuts-make-public-health-emergency-krupp-opinion/index.html [https://perma.cc/SAM5-KASL]. Therefore, it seems that the potential ability for Congress to curtail the environmental impacts of the Executive might not be so reliable.

7. César Cuauhtémoc García Hernández, *Radical Environmentalism: The New Civil Disobedience?*, 6 SEATTLE J. SOC. JUST. 289, 308–13 (2007); *see also* Ian McCloskey, *The New Necessity: Environmental Activists' Novel Take on the Ancient Criminal Defense*, 5 ARIZ. J. ENVTL. L. & POL'Y 1062 (2015); Lance N. Long & Ted Hamilton, Case Comment, *Washington v. Brockway: One Small Step Closer to Climate Necessity*, 13 MCGILL J. SUSTAINABLE DEV. 153, 159–60 (2017).

8. Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 79 n.1 (1989) (quoting Carl Cohen, *Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1 (1966)) (emphasis omitted).

9. John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 111 (2007).

10. *Id.* at 113.

> Civil disobedience is an act of protest, deliberately unlawful, conscientiously and publicly performed. It may have as its object the laws or policies of some governmental body, or those of some private corporate body whose decisions have serious public consequences; but in either case the disobedient protest is almost invariably nonviolent in character.

The sense that they have no other political or legal recourse leads people to respond to the issue with protests.[11] Not surprisingly, civil disobedience has been a popular avenue for climate change advocates. In fact, Kara Moss, an opinion writer for the *Guardian*, went so far as to claim that civil disobedience might be the only route left in the fight against climate change.[12]

Civil disobedience in the realm of climate change has been successful in stopping, or at least slowing down, particular projects. For example, the Keystone XL Pipeline, a pipeline that would transfer fuel from Canadian tar sands to the United States, has been a hotly debated political issue.[13] One reason protests have erupted across the country to try and thwart the construction of the pipeline is the exacerbation this source of energy could have on climate change.[14] Some activists even turned to civil disobedience in a last ditch effort to make their disagreement with the construction of the pipeline known.[15]

As a result, on November 6, 2015, President Barack Obama denied the pipeline an essential permit, stating it would not

Cohen, *supra* note 8, at 39–40.

11. Hernández, *supra* note 7, at 308–13.

12. *See* Kara Moses, *Civil Disobedience Is the Only Way Left to Fight Climate Change*, THE GUARDIAN: OPINION (May 13, 2016, 5:50 AM), https://www.theguardian.com/commentisfree/2016/may/13/civil-disobedience-climate-change-protesters [https://perma.cc/UX6S-LXPJ]. In keeping with this notion, organizations such as the Climate Disobedience Center and Climate Defense Project, have sprung up to help those who wish to protest climate change peacefully. *See Our Work*, CLIMATE DISOBEDIENCE CTR., http://www.climatedisobedience.org/ [https://perma.cc/W3N2-Z6DE] (last visited Apr. 20, 2019) ("The Climate Disobedience Center exists to support a growing community of climate dissidents who take the risk of acting commensurate with the scale and urgency of the crisis."); *About*, CLIMATE DEF. PROJECT, https://climatedefenseproject.org/about/ [https://perma.cc/9ZWB-TA7R] (last visited Apr. 20, 2019) ("The movement to respond to climate change needs a movement-based model of climate lawyering. CDP provides innovative legal arguments and comprehensive legal support for climate activists.").

13. Melissa Denchak, *What Is the Keystone Pipeline*, NRDC (Apr. 7, 2017), https://www.nrdc.org/stories/what-keystone-pipeline [https://perma.cc/6B38-4ZG3]; *see also* Brad Plumer, *The Keystone XL Pipeline Is Dead. Here Is Why Obama Rejected It*, VOX (Nov. 7, 2015), https://www.vox.com/2015/11/6/9681340/obama-rejects-keystone-pipeline [https://perma.cc/3NWP-RTHG].

14. Suzanne Goldenberg, *Keystone XL Protestors Pressure Obama on Climate Change Promise*, THE GUARDIAN (Feb. 17, 2013, 4:13 PM), https://www.theguardian.com/environment/2013/feb/17/keystone-xl-pipeline-protest-dc [https://perma.cc/7MMT-GZWG].

15. *See* Steven Mufson, *Keystone XL Pipeline Opponents Turn to Civil Disobedience*, WASH. POST (Oct. 15, 2012), https://www.washingtonpost.com/business/economy/keystone-xl-pipeline-opponents-turn-to-civil-disobedience/2012/10/15/2d0a8310-16e5-11e2-a55c-39408fbe6a4b_story.html?utm_term=.9a68e53b18aa [https://perma.cc/RY2X-LPHZ].

improve the United States' energy security, would not "make a meaningful long-term contribution to [the] economy," and would "undercut America's 'global leadership' on climate change."[16] This was a major victory for climate change activists throughout the country. It showed the potential efficacy of climate change protests and civil disobedience, as it is unlikely that the government would have made such a determination without the public outcry. However, this victory was short lived, as President Trump granted approval for the Pipeline through an executive order in January of 2017, immediately after taking office.[17] Still, despite the President's actions after the fact, the protests were able to affect political change at the highest level of the executive branch.

Although it is popular and effective, climate activists who wish to use civil disobedience still face a substantial problem. Their actions are, by definition, illegal. Therefore, individuals who plan on participating in such actions need to consider the risk of criminal prosecution. To avoid prosecution, the common law and, in some states, statutory law have provided defendants with a potential defense—the necessity defense.[18] Put simply, "[t]he necessity defense asserts that breaking the law [is] justified in order to avert a greater harm that would occur as a result of the government policy the offender was protesting."[19]

While it may be difficult to succeed on the assertion of a necessity defense in a climate change case, it has not stopped climate change advocates from attempting to assert the defense in the past. These activists—turned defendants—are not without help. The Climate Defense Project ("CDP") is a group of attorneys committed to filling "a gap in the legal landscape by supporting front-line activists, pursuing climate impact litigation, and connecting attorneys with communities and campaigns."[20] One of the main

16. Plumer, *supra* note 13.

17. Denchak, *supra* note 13. Since this executive order, customer support has increased for the Pipeline, and it seems that construction could again be imminent. Miranda Green, *Keystone XL Has Sufficient Customer Demand to Build, Developer Says*, THE HILL (Jan. 18, 2018, 3:09 PM), http://thehill.com/policy/energy-environment/369597-keystone-xl-has-sufficient-customer-demand-to-build-developer-says [https://perma.cc/4CV4-DQZ7]. *But see* Emily Sullivan, *In a Setback for Trump, Judge Blocks Keystone XL Pipeline Construction*, NPR (Nov. 9, 2018, 3:54 AM), https://www.npr.org/2018/11/09/665994751/judge-puts-keystone-xl-pipeline-on-hold-pending-further-environmental-study.

18. *See generally* Cohan, *supra* note 9; Schulkind, *supra* note 8.

19. Cohan, *supra* note 9, at 111.

20. *About*, CLIMATE DEF. PROJECT, *supra* note 12.

avenues the group uses to support activists is facilitating climate activists' use of the necessity defense.[21]

With the need to mitigate climate change so pressing and the proper legal support system in place, some state courts have begun to take notice. In fact, in three recent decisions, which will be discussed more fully in Part III, courts have allowed defendants in climate change civil disobedience cases to present the necessity defense to a jury.[22] No climate change defendant has ever been completely acquitted based on the necessity defense as of the writing of this Note, but as will be discussed in Part II, just presenting the necessity defense to a jury is a difficult task, and should be considered a success[23] that could lead to a higher rate of acquittals.[24]

Inspired by the recent success of climate change defendants in asserting the necessity defense, and by the critical need for alternative avenues to combat climate change, this Note aims to provide guidance for climate change litigants who wish to use the necessity defense in climate change litigation. The goal of this Note is not to provide a thorough analysis of *why* the necessity defense is an appropriate mechanism to be used in climate change cases, as other scholars have already answered this question compellingly;[25] rather, its aim is to provide climate change activists and litigants with important advice and considerations on *how* to use the necessity defense as effectively as possible. Since the burden to properly assert the necessity defense is extremely difficult to meet, especially in climate change cases, this Note hopes to play a role in assisting climate change litigants who attempt to use it.

This Note will proceed in four parts. Part I will provide the reader with the basic requirements litigants must satisfy when asserting the necessity defense in various courts throughout the

21. *See generally*, CLIMATE DEF. PROJECT, https://climatedefenseproject.org/ [https://perma.cc/4BGV-NBJQ] (last visited Apr. 20, 2019).

22. *See* Washington v. Taylor, No. 6Z0117975 (Wash. Dist. Ct. Oct. 16, 2017); State v. Klapstein, No. 15-CR-16-413 (Minn. Dist. Ct. Oct. 13, 2017); Washington v. Brockway, No. 5053A-14D (Wash. Dist. Ct. Jan. 13, 2016).

23. *See infra* Part.II.A.

24. People v. Gray, 150 Misc. 2d 852, 854 (N.Y. Crim. Ct. 1991) ("Moreover, when the necessity defense is actually submitted to the trier of fact in [civil disobedience] cases, defendants have usually been acquitted.").

25. *See* Long & Hamilton, *supra* note 7; Lance N. Long & Ted Hamilton, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases*, 38 STAN. ENVTL. L.J. 57 (2018).

United States.[26] In Part II, this Note will discuss defendants' use of the necessity defense in contexts apart from climate change, and will categorize the claims by whether or not they were successful. Part III will provide historical examples of the attempted use of the necessity defense in climate change cases. Finally, Part IV will use both climate change and non-climate change related cases as examples of how to make a successful necessity defense. The goal of this Note is to assist climate change litigants who wish to assert the necessity defense, by providing their lawyers with the best possible avenue for success.

I. NECESSITY DEFENSE BASICS

A. Affirmative Defense

The necessity defense is an affirmative defense.[27] An affirmative defense is a defense that "will defeat the . . . prosecution's claim, even if all the allegations in the complaint are true."[28] Under such a defense, the defendant does not need to disprove the wrongdoing. Rather, they can provide evidence that it was *necessary* to commit the crime. In other words, the necessity defense justifies "[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another."[29] Although it varies by jurisdiction, many formulations of the necessity defense simply require that the defendant "'reasonably anticipat[e] a direct causal

26. This Note will only focus on United States' courts treatment of the necessity defense in climate change cases. For an example of other country's treatment of the necessity defense in climate change actions, see, e.g., Hugo Tremblay, *Eco-Terrorists Facing Armageddon: The Defence of Necessity and Legal Normativity in the Context of Environmental Crisis*, 58 MCGILL L.J. 321 (2012).

27. MODEL PENAL CODE § 3.01(a) (AM. LAW INST. 2016).

28. *Affirmative Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

29. MODEL PENAL CODE § 3.02(1) (AM. LAW INST. 2016)

> (1) Conduct that the actor believes to be necessary to avoid harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sough to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Id. See also William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 11 (2003) ("The basic theory of the necessity defense is that the defendant properly exercised her or his free will and violated the law in order to achieve a greater good or prevent a greater harm.").

relationship between their conduct and the harm to be averted."[30] This categorization of the necessity defense, as an affirmative defense, is critical in climate protest cases because individuals generally know that their actions are illegal, but they purposely commit the crime with a political motive in mind. In the case of climate change, protestors proceed with the belief that "in order to . . . prevent [the] greater harm" of climate change, the illegal activity must occur.[31] However, in states that recognize the necessity defense as an affirmative defense, the main hurdle defendants face is that the defendants have the burden of proof, not the prosecution.

While the necessity defense is considered an affirmative defense in most states, some states do not categorize it as such, which could be to protestors' advantage. One such state is New York, which makes it clear that: "Justification is a defense, not an affirmative defense. If a defendant's conduct is justified on the ground of necessity or choice of evils under Penal Law § 35.05(2), it is not unlawful."[32] As a result, if the defense is properly raised, the prosecution must "prove beyond a reasonable doubt that defendant's conduct was not justified,"[33] which significantly lightens the burden on the defendant.

B. Elements of the Necessity Defense

The recognition of the necessity defense varies from state-to-state and from court-to-court. In some states, including New York, the necessity defense is codified by statute,[34] while in other states and in the federal court system, the necessity defense is only recognized through the common law.[35] As the requirements may vary depending on the jurisdiction, the sections below will give a broad overview of the necessary elements in the federal common law, state common law, and state statutory law, as examples of the typical requirements needed to satisfy the defense. However, if planning to use the defense in a particular jurisdiction, a litigant

30. Quigley, *supra* note 29, at 11.
31. *Id.*
32. People v. Craig, 78 N.Y.2d 616, 619 n.1 (1991).
33. *Id.*
34. *See, e.g.*, N.Y. PENAL LAW § 35.05 (McKinney 2016).
35. For example, one such state that does not have a codified necessity defense is the state of South Carolina.

should be sure to check the requirements in their respective jurisdiction.[36] This Part will also discuss what elements might be the most difficult to meet in the context of climate change litigation.

1. Federal Common Law

Federal law does not have a statute that codifies the necessity defense. In addition, the Supreme Court has never explicitly recognized the affirmative defense of necessity.[37] However, there is precedent to suggest that it has been implicitly accepted by the Court.[38] For instance, Justice Blackmun stated that "[t]he concept of such a defense . . . is 'anciently woven into the fabric of our culture.'"[39] Although not explicitly recognized by the Supreme Court, it has been recognized in certain federal circuit courts. For example, the Ninth Circuit has held that:

> To invoke the necessity defense, therefore, the defendants colorably must have shown that: (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their

36. For a handy guide and description of the requirements in all jurisdictions in the United States, see CLIMATE DEF. PROJECT, POLITICAL NECESSITY DEFENSE JURISDICTION GUIDE (2017) [hereinafter JURISDICTION GUIDE].

37. *See* Long & Hamilton, *supra* note 7, at 156 ("The Supreme Court noted: '[I]t is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute . . . Even at common law, the defense of necessity was somewhat controversial . . . . And under our constitutional system, in which federal crimes are defined by statute rather than by common law . . . it is especially so.'" (quoting United States v. Oakland Cannabis Buyers Corp., 532 U.S. 483, 490 (2001)) (internal citations omitted); *see also* Blake Nicholson & Steve Karnowski, *Oil Pipeline Opponent Uses 'Necessity Defense:' What Is It?*, ASSOCIATED PRESS, Oct. 25, 2017, https://apnews.com/ea4c816782bf4d0a90ae1a7b5019aa6b [https://perma.cc/K66S-MZQB] ("The U.S. Supreme Court has said it's an 'open question' whether federal courts have authority to recognize a necessity defense not provided by law, according to North Dakota District Court Judge Laurie Fontaine.").

38. United States v. Bailey, 444 U.S. 394, 425 (1980) (Blackmun, J., dissenting) ("Although the Court declines to address the issue, it at least implies that it would recognize the common-law defense of duress and necessity to the federal crime of prison escapes, if the appropriate prerequisites for assertion of either defense were met."); *see also* Schulkind, *supra* note 8, at 83 ("Although there is no federal codification of the defense, the Supreme Court has accepted it as part of the federal common law.").

39. *Bailey*, 444 U.S. at 425 (quoting JEROME HALL, GENERAL PRINCIPLES OF COMMON LAW 416 (2d ed. 1960)).

> conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law.[40]

Thus, in federal court, a litigant is generally required to prove four elements, each of which must be satisfied for the defendant to succeed.

To meet these requirements, "[i]t is sufficient that the defendant have shown an underlying 'evidentiary foundation' as to each element of the defense, 'regardless of how weak, inconsistent or dubious' the evidence on a given point may seem."[41] More importantly for purposes of the climate necessity defense, however, courts have generally "not been accommodating to political necessity arguments . . . preclud[ing] their presentation on grounds that they fail to raise any 'underlying evidentiary foundation.'"[42]

While it is beyond the scope of this Note to explain how various courts treat each prong of the necessity defense, two of the prongs, which can sometimes be molded together in a court's analysis, are the reasonable alternatives prong and the imminence prong, as they are requirements in most jurisdictions and could be a serious challenge for climate change litigants.

It is important to recognize that the Eighth Circuit has stated that "[a] vital element of any necessity defense is the lack of a reasonable alternative to violating the law, that is, the harm to be avoided must be so imminent that absent the defendant's criminal acts, the harm is certain to occur."[43] The court went on to quote another circuit, which stated that:

> The defense of necessity does not arise from a "choice" of several courses of action, it is instead based on a real emergency. It can be asserted only by a defendant who was confronted with such a crisis as a personal danger, a crisis which did not permit a selection from

40. United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991); *see also* United States v. Dorrell, 758 F.2d 427, 430–31 (9th Cir. 1985); United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1979).

41. United States v. Broadhead, 714 F. Supp. 593, 596 (D. Mass. 1989) (quoting United States v. Kabat, 797 F.2d 580, 590–91 (8th Cir. 1986)) (internal citations omitted).

42. *Broadhead*, 714 F. Supp. at 596 (quoting *Kabat*, 797 F.2d at 591).

43. *Kabat*, 797 F.2d at 591; *see also* Long & Hamilton, *supra* note 25, at 103.

> among several solutions, some of which did not involve criminal acts. It is obviously not a defense to charges arising from a typical protest.[44]

If this standard is adopted by all circuits, it would make it nearly impossible for climate change protestors to meet this standard, as the impacts of climate change can only be measured in, at best, hundreds of year increments. In addition, as is the case for most civil disobedience, but especially climate change civil disobedience, there are probably alternative legal actions available to the protestors besides illegal activity, such as petitioning their congressperson and other political leaders, which is not to say that these actions will necessarily be as effective.

However, there is hope, as the treatment of imminence in necessity defense cases is inconsistent with how the Supreme Court has treated imminence in its standing doctrine.[45] For example, the Supreme Court in *Massachusetts v. EPA* found that: "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'"[46] Thus, as suggested by Long and Hamilton, these cases should provide "a blueprint for imminence analysis in necessity cases."[47] Moreover, Long and Hamilton assert that courts should interpret imminence based on "two distinct concepts:"

> The first is a traditional temporal imminence where climate change currently causes serious human harm and death that is demonstrable and at least provides a legitimate question of fact for a jury. The second is imminence in the sense of a pending and certain catastrophic harm that will be caused by climate change.[48]

If this alternative form of the imminence standard, based in large part on the Court's standing jurisprudence, is followed, then climate change protestors would have a stronger case for a necessity

44. *Kabat*, 797 F.2d at 591 (quoting United States v. Seward, 687 F.2d 1270, 1276 (10th Cir. 1982)).

45. For an extended discussion of how the imminence prong has been improperly used in climate necessity defense cases and how it should mimic the imminence requirement of the standing doctrine, see Long & Hamilton, *supra* note 25, at 89–96.

46. Massachusetts v. EPA, 549 U.S. 497, 521 (2007) (quoting Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992); *see also* Long & Hamilton, *supra* note 25, at 91 (citing *Massachusetts*, 549 U.S. at 521).

47. Long & Hamilton, *supra* note 25, at 92.

48. *Id.* at 96.

defense. However, as this has not been how federal courts and most state courts have recognized the imminence requirement of the necessity defense in the past,[49] the imminence requirement could be a large obstacle for climate change protestors.[50]

2. State Common Law

Like the federal common law, states that do not have a statute allowing the necessity defense have case law which dictates the requirements a defendant must follow to make a case for the necessity defense. One such example is the state of South Carolina. To assert the necessity defense in South Carolina, the defendant must satisfy the following three elements:

> (1)[T]here is a present and imminent emergency arising without fault on the part of the actor concerned; (2) the emergency is of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done; and (3) there is no other reasonable alternative, other than committing the crime, to avoid the threat of harm.[51]

Unlike its federal law counterpart, South Carolina law reduces the requirements to three elements, but it seems to touch on all the same points. One point missing from the South Carolina criteria that is present in the federal common law requirements, is the direct causal relationship prong. This omission from the requirements could provide an easier route for South Carolina climate change protestors looking to use the defense.

However, the real difference, at least in South Carolina, is the standard of proof required to get to the jury. Rather than the malleable standard mentioned in *United States v. Broadhead*, which is discussed above, in South Carolina "the defendant must establish [the necessity defense] by a preponderance of the evidence."[52] As will be discussed below in Part II.A., this slight modification could be the difference between acquittal and conviction.

49. *Id.* at 95.

50. On ways to provide the best possible argument to a trial court on the imminence prong, see *infra* Part IV.

51. State v. Cole, 304 S.C. 47, 49–50 (1991); *see also* JURISDICTION GUIDE, *supra* note 36.

52. *Cole*, 304 S.C. at 50.

3. State Statutory Law

Finally, a small number of state legislatures have codified the necessity defense.[53] One such state is New York, which requires a defendant who asserts the necessity defense to show that:

> Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.[54]

The trial court must make the initial determination, as a matter of law, "whether the claimed facts and circumstances would, if established, constitute a defense."[55] If the court views the record in a light most favorable to the defendant and determines that the evidence supports a defense of justification, the court should instruct the jury to consider the defense.[56] This standard, as opposed to the state common law standard of South Carolina, seems quite favorable to the defendant.

In New York, the major difference is the categorization of the defense as a defense, not an affirmative defense.[57] This places the burden of proof on the prosecutor. Therefore, if the defendant can convince the judge to allow the use of the necessity defense, then the prosecution has to disprove the defense beyond a reasonable doubt.[58] New York is a jurisdiction quite favorable to defendants asserting the necessity defense, as the burden of proof to present a defense to a jury is relatively low, and if the defense

53. For a full list of the states that have codified the necessity defense, see JURISDICTION GUIDE, *supra* note 36.

54. N.Y. PENAL LAW § 35.05(2) (McKinney 2017).

55. *Id.*

56. People v. Padgett, 456 N.E.2d 795, 797 (N.Y. 1983) (internal citations omitted).

57. *See supra* Part I.A.

58. *See* People v. Gray, 150 Misc. 2d 852, 855 (N.Y. Crim. Ct. 1991) ("It is particularly important to clearly delineate and evaluate whether defendants have met their initial burden of production in trials involving the necessity defense, since if that question is resolved in a defendant's favor, the burden of proof then shifts dramatically, and the People must disprove the defense beyond a reasonable doubt."); *see also* JURISDICTION GUIDE, *supra* note 36.

makes it to a jury, the burden is on the prosecution to disprove the defense altogether.

C. Important Distinction Between Indirect and Direct Civil Disobedience

One important distinction to note for the use of the necessity defense in civil disobedience cases is whether the action is a direct or indirect act of civil disobedience. A direct act of civil disobedience "involves the intentional violation of a specific law that, in and of itself, is challenged as unjust."[59] Examples would be smoking marijuana in public in a state that has not decriminalized marijuana[60] and the lunch counter sit-ins during the 1960s in states that had discriminatory laws against African Americans.[61] On the other hand, indirect civil disobedience "involves violating a law or interfering with a government policy that is not, itself, the object of the protest."[62] One example would be trespassing to block deliveries to an energy plant, such as a nuclear power plant. Here the protestors are not protesting the law of trespass, but rather, the use of nuclear energy.[63]

The difference between the types of civil disobedience discussed above might seem trivial, but in terms of precedent, the type of civil disobedience used could preclude a defendant from presenting the defense altogether. The most famous case distinguishing the two is *United States v. Schoon*.[64] In *Schoon*, protestors entered the office of the Internal Revenue Service ("IRS") and splashed blood on the walls of the building to show their disagreement with the United States' involvement in El Salvador. In essence, the defendants claimed that their actions were "necessary to avoid future bloodshed in that country."[65] The court determined that the

59. Cohan, *supra* note 9, at 114; *see also* United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991) ("Direct civil disobedience . . . involves protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow."); Schulkind, *supra* note 8, at 79 n.5.

60. Cohan, *supra* note 9, at 114.

61. Schulkind, *supra* note 8, at 79 n.5; *see also* Cohan, *supra* note 9, at 114.

62. *Schoon*, 971 F.2d at 196; *see also* Cohan, *supra* note 9, at 114. ("Indirect civil disobedience, which is undoubtedly the most frequent form of protest, involves the violation of a law which is not itself the object of protest. Indirect civil disobedience seeks to mobilize public opinion, typically through symbolic action."); Schulkind, *supra* note 8, at 79–80.

63. Cohan, *supra* note 9, at 114.

64. *Schoon*, 971 F.2d at 195.

65. *Id.*

actions of the defendants were indirect actions of civil disobedience, not direct actions and therefore did not qualify as a necessity defense.[66] In denying the defendants' requests to use the necessity defense, the court held that "[i]ndirect protests of congressional policies can never meet all the requirements of the necessity doctrine. Therefore, we [the court] hold that the necessity defense is not available in such cases."[67]

The Ninth Circuit's holding in *Schoon*, if followed by other circuits, may completely eliminate the ability for defendants to use the necessity defense in all indirect acts of civil disobedience, including those related to climate change. Thus, as will be discussed more in depth in Part IV, when making decisions on potential civil disobedience actions and presenting a case to the court in climate protest cases, it will be critical to try and frame the action as a direct act of civil disobedience, rather than an indirect act.

II. HISTORICAL USE OF THE NECESSITY DEFENSE: SUCCESSFUL AND UNSUCCESSFUL CLAIMS

Despite being codified in only a minority of states, the necessity defense has been widely recognized by courts throughout the United States. To better understand how courts have treated the defense and to provide guidance on how to effectively use it in climate protest cases, it is important to examine what types of claims have been successful historically. Thus, this Part will lay out parameters for a successful claim and offer illustrations of unsuccessful and successful uses of the necessity defense, to provide a basic understanding of how it failed in the past and how to avoid failure in the future.

A. Define Success as Getting to a Jury

In all jurisdictions, the court first makes a determination as to whether the jury should get to hear the necessity defense.[68] Even

66. *Id.* at 196.

67. *Id.* at 199–200. For a more comprehensive analysis of the case, see, e.g., James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and* United States v. Schoon, 81 CALIF. L. REV. 351 (1993); Long & Hamilton, *supra* note 7, at 162–64.

68. *See, e.g.*, N.Y. PENAL LAW § 35.05(2) (McKinney 2017) ("Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if

though this may not seem like a difficult obstacle, due to the fact that many courts have lax evidentiary standards at this stage of a criminal trial,[69] "judges often make pre-trial determinations that juries will not hear evidence of necessity in protest cases."[70] It has been further stated that defendants' "actions rarely get the chance to be weighted by a jury to see if they are just."[71] Therefore, whether or not this is the appropriate treatment of the necessity defense,[72] it is clear that juries may not have the chance to hear the defendant's necessity defense claim. More importantly, scholars have noted that when the necessity defense gets to trial, juries, acting as fact finders, "tend to acquit when they actually hear a political necessity defense."[73] As such, by keeping the necessity defense away from the fact finder, courts could be eliminating a real opportunity for acquittal.

In the short history of the use of the climate necessity defense, courts have rarely allowed the cases to go to a jury. In fact, at the present moment, use of the climate necessity defense has only been attempted in twenty-eight cases and has rarely been allowed to go to a jury, all of which were in relatively recent cases.[74] Even though

established, constitute a defense."); State v. Drummy, 557 A.2d 574, 576 (Conn. App. Ct. 1989) ("The trial court correctly ruled that the defendants' proffered evidence regarding their proposed defense of necessity was insufficient as a matter of law.").

69. *See supra* Part I.A and Part I.C.

70. Quigley, *supra* note 29, at 5.

71. *Id.* at 4.

72. Some commentators have argued that the jury should have the opportunity to hear more necessity defense claims. *See generally id.* (arguing that the jury should be allowed to hear more necessity defense arguments rather than the court usurping the opportunity to do so in pre-trial motions); Long & Hamilton, *supra* note 7.

73. Long & Hamilton, *supra* note 7, at 160; *see also* People v. Gray, 150 Misc. 2d 852, 854 (N.Y. Crim. Ct. 1991) ("Moreover, when the necessity defense is actually submitted to the trier of fact in [civil disobedience] cases, defendants have usually been acquitted.").

74. In the previous cases the jury never actually got to hear the defense. In *Commonwealth v. O'Hara*, No. 1332CR593 (Mass. Dist. Ct. Sept. 8, 2014), the jury was set to hear the defense, but the prosecution dropped the case on the eve of the trial. *See* CLIMATE DEF. PROJECT, CLIMATE DEFENSE CASE GUIDE: A GUIDE FOR ACTIVISTS AND ATTORNEYS 16 (2019), https://climatedefenseproject.org/wp-content/uploads/2019/04/CDP-Climate-Necessity-Defense-Case-Guide-April-3-2019.pdf [https://perma.cc/5QBA-ACQQ] [hereinafter CASE GUIDE]. In addition, the court did allow the necessity defense to go the jury in *Washington v. Brockway*; however, after the jury heard testimony, the court denied the defendants ability to use the defense and would not instruct the jury on the defense. *See* Long & Hamilton, *supra* note 7, at 172 (citing Transcript of Proceedings vol. 4 at 87, 89, Washington v. Brockway, No. 5053A-14D (Wash. Dist. Ct. Jan. 13, 2016)). Similarly, in *Massachusetts v. Gore*, the defense was prepared to present the necessity defense to a jury, but the prosecution reduced the charges to a civil infraction, which led to the defense not reaching a jury. CASE GUIDE,

it has been ruled to be allowed to go to a jury, and has actually been presented to a jury previously, it has never actually been allowed to be used as an instruction and ruled on by a jury.

Therefore, due to the courts' hesitance to allow necessity defenses to go to trial, it is appropriate to define *success* in climate change necessity defense cases, not by whether the jury actually acquits based on necessity defense grounds, although that will obviously also be deemed a success, but rather, more broadly. Therefore, for the purposes of this Note, success will also encapsulate cases, in which, the jury heard the necessity defense and decided on its merits.

B. Successful Claims

In the past, successful necessity defense claims occurred in situations where most individuals and courts would not, and seemingly could not, disagree with the imminence, lack of legal alternatives, and choice of evils faced by the defendant. This overall consensus on the necessity defense prongs is not necessarily the case when it comes to climate change cases, which is not to suggest that all of these criteria are not present in climate change protest cases. Rather it is to show the importance of providing a strong evidentiary background when trying to use the defense in climate change cases. To aid in this discussion, the sections below will present examples of cases where defendants were able to successfully use the necessity defense and will provide brief explanations of how the strategies used in those cases can assist in a climate change case.

1. Civil Opposition to Opening of Vehicular Bridge Traffic

One of the closest examples to climate change cases that successfully received a necessity defense instruction was *People v. Gray*.[75] In this case, defendants were charged with disorderly conduct for blocking the entrance to the Queensboro Bridge.[76] The purpose of their action was to protest the opening of a pedestrian lane to vehicular traffic.[77] The court determined that

supra note 74, at 7. Notably, the defense successfully convinced the court to determine that they were not guilty of the infraction because of necessity.

75. *Gray*, 150 Misc. 2d 852.

76. *Id.* at 853.

77. *Id.*

the choice of evils requirement was satisfied by the fact that (1) additional air pollution was harmful to New Yorkers, and (2) the addition of the new lane created an increased threat of harm to pedestrians from being hit by cars at night.[78] Regarding the imminence of harm requirement, the court determined that the expert's testimony supporting the defendants' fear of increased harm was valid.[79] In regard to the "no legal alternatives requirement," the court rejected the argument that there is always a legal means of accomplishing their goal, through protest.[80] The court reasoned that the purpose of the necessity defense would be completely distorted if any single alternative could thwart its use.[81] Finally, New York's causal requirement can be satisfied by the defendant's reasonable belief that his or her actions would halt the harms sought to be avoided, which was satisfied here by showing recent examples of similar protest that effectuated political change.[82] As a result of these findings, the court acquitted the defendants.[83]

This case has strong applicability to climate protest cases. Here, the defendants used indirect civil disobedience to prevent harm caused by a government policy that the defendants believed were harmful to themselves and the public at large. This argument seems to fit nicely into civil disobedience related to climate change, and moreover, the court set a precedent of a more abstract and broad definition of "harm" by recognizing that the "unnecessary deaths of U.S. citizens as a result of environmental hazards and disease—are far greater than those created by a trespass or disorderly conduct."[84] Thus, this case shows that, at least in New York, the climate necessity defense is not only possible, but already exists in case law.

78. *Id.* at 856–59. The court also mentioned other situations where the choice of evils requirement can be satisfied. *Id.* at 857 ("Courts have generally recognized that the harms perceived by activists protesting nuclear weapons and power and United States domestic and foreign policy—nuclear holocaust, international law violations, torture, murder, the unnecessary deaths of U.S. citizens as a result of environmental hazards and disease—are far greater than those created by a trespass or disorderly conduct.").

79. *Id.* at 859–65.

80. *Id.* at 866.

81. *Id.*

82. *Id.* at 869–71.

83. *Id.* at 871. For further analysis of this case, see Long & Hamilton, *supra* note 7, at 160.

84. *Gray*, 150 Misc. 2d at 857.

2. Driving with a Suspended License

Another example of a situation that warrants the use of the necessity defense is driving with a suspended license in an emergency situation. In *State v. Cole*, a defendant with a suspended license, whose wife also happened to be pregnant and undergoing labor pains, drove to the nearest phonebooth to call for help. While on his way back home, the defendant was stopped by law enforcement.[85] The court determined that on the facts of the case, "public policy mandate[d] that we extend our prior decisions regarding necessity, to cases where a defendant is accused of driving under a suspended license."[86]

While this case is drastically different than individuals protesting climate change, it is illustrative of the direction climate change litigation may go in the future. For example, as climate science continues to grow and the harms associated with lack of action against climate change become more dire, perhaps public policy will "mandate"[87] that the necessity defense be extended to climate change. However, until that point, it is imperative that litigants provide the greatest factual support possible regarding the imminence and threat of climate change.

3. Prison Escape Cases

Examples of situations where the court has ruled in favor of prisoners who used the necessity defense to justify their escape from prison can also shed light on the discussion. For example, one scholar noted that "the prisoner who escapes from a prison which has caught fire" will be allowed to use the defense.[88] Another situation where prisoners have the potential to use the necessity defense to combat charges of escape is when there is fear of sexual assault or violence. For instance, in *People v. Lovercamp*, prisoners, who were repeatedly forced to either have sex with other inmates or fight those same inmates,[89] fled the prison one day

85. State v. Cole, 403 S.E.2d 117, 118 (S.C. 1991).

86. *Id.* at 119.

87. *Id.*

88. Martin R. Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free from Sexual Assault*, 49 S. CALIF. L. REV. 110, 119 (1975); *see also* Judith Zubrin Gold, *Prison Escape and Defenses Based on Conditions: A Theory of Social Preference*, 67 CALIF. L. REV. 1183, 1197 (1979) ("[A] prisoner who yearns to be free but escapes to avoid death (as, for example, by fire) will not lose an otherwise solid defense of necessity.").

89. People v. Lovercamp, 43 Cal. App. 3d 823, 825 (Cal. Ct. App. 1974).

when a fight broke out and were eventually recaptured.[90] When reviewing the case, the court created five criteria[91] that defendants needed to meet in order to successfully present a necessity defense in this context. In the end, the court ultimately held that the defendants' conditions in *Lovercamp* could excuse the felony.[92]

The specificity of the criteria set up in cases such as *Lovercamp* suggests that the requirements are unique to those cases alone. However, climate protestors can learn from the prison cases the level of threat and imminence that needs to be shown to successfully assert the necessity defense.

4. Homeless Individuals Breaking Public Ordinances

Homeless individuals have also been able to use the defense when charged with breaking public ordinances in regard to their presence in public places at certain hours. One such case was In re *Eichorn*, in which a homeless man, who was having difficulty finding a job due to poor economic times, could not find room in a shelter one evening and, as a result, slept on the street.[93] He was initially charged with breaking a public ordinance that banned sleeping in public areas at night.[94] However, after reviewing the facts of the case, the court held that "there was substantial if not uncontradicted evidence that defendant slept in the civic center because his alternatives were inadequate and economic forces were primarily to blame for his predicament."[95]

Like the two examples above, this case makes clear that there are certain situations where the law should not punish individuals for actions that generally do not seem *wrong*. The question remains,

90. *Id.*

91. The five criteria are as follows:

(1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;

(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

(3) There is no time or opportunity to resort to the courts;

(4) There is no evidence of force or violence used towards prison personnel or other 'innocent' persons in the escape; and

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

Id. at 831–32.

92. *Id.* at 832.

93. *In re* Eichorn, 81 Cal. Rptr. 2d 535, 536 (Cal. Ct. App. 1998).

94. *Id.*

95. *Id.* at 540.

however, of how climate change litigants can present a case that invokes a similar sense of *obvious wrong* as the preceding examples.

C. Unsuccessful Claims

The necessity defense has been asserted in various types of cases with varying degrees of success. The sections below will provide examples of unsuccessful cases[96] to better understand why courts might deny a defendant's use of the defense and provide arguments that climate litigants could use to differentiate their cases from the cases discussed.

1. Abortion Protest Cases

In general, courts have been reluctant to allow people protesting abortion to assert the necessity defense as grounds for acquittal. For example, in *Bird v. Municipality of Anchorage*, defendants blockaded the front door of an abortion clinic. When they were asked to leave, they refused to do so.[97] Upon refusal they were arrested for trespass.[98] In its decision, the court went through the three prongs necessary for the defense in Alaska: (1) the act was done to avoid an evil, (2) there was no alternative, and (3) the harm caused by the protest was not disproportional to the avoided harm.[99] In holding that "the necessity defense is not available to those who trespass at abortion clinics in an attempt to prevent abortions," the court based its decision on the fact that abortions were not unlawful acts, the protestors had alternative non-illegal forms of protest available, and that they failed to show that the avoided harm would be less than the harm caused.[100]

96. The listed cases are by no means an exhaustive representation of the situations where the necessity defense has been asserted. The examples are simply an illustrative list to help further the purpose of this Note.

97. Bird v. Municipality of Anchorage, 787 P.2d 119, 120 (Alaska Ct. App. 1990).

98. *Id.*

99. *Id.* at 121–22.

100. *Id.* at 121, 123. This holding is not unique to Alaska. Almost all cases that were presented with the same or a similar question held that the necessity defense would not be available. *See, e.g.*, United States v. Turner, 44 F.3d 900, 901–03 (10th Cir. 1995); Zal v. Steppe, 968 F.2d 924, 929 (9th Cir. 1992); Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1350–52 (3d Cir. 1989); People v. Garziano, 281 Cal. Rptr. 307 (Cal. Ct. App. 1991); City of Wichita v. Tilson, 855 P.2d 911, 915–18 (Kan. 1993); McMilllan v. City of Jackson, 701 So. 2d 1105 (Miss. 1997); Buckley v. City of Falls Church, 371 S.E.2D 827 (Va. Ct. App. 1988). In fact, at least from the author's research, there has only been one case where the court determined that the necessity defense properly should be given to a jury,

The abortion decisions could show an inherent difficulty in the climate protest cases. Like abortion, the climate-altering activities that people are protesting tend not to be illegal. For instance, individuals who wish to trespass to stop energy production are trying to stop activities that are unambiguously legal under current laws. However, one might be able to make the argument that the potential harms from climate change, which can be numerous,[101] might be more detrimental than those in the case of abortions. Although, this would surely be a contested issue due to the fact that climate change protests will not be able to stop climate change altogether, at best, the protestors might be able to stop a miniscule amount of emissions in a given day, week, or month. More importantly, the protests might grab the attention of political leaders, which could affect policy decisions in the long-term.[102]

2. War Time Protests

The use of the necessity defense in war time protests has also been unsuccessful in the past.[103] In *Muller v. State*, defendant was convicted of trespass when he refused to leave a senator's office at the close of the business day, in protest of the Iraq War.[104] Using the same criteria as in *Bird*, the court held that because defendant could not show that "his actions had any realistic hope of ending the war in Iraq" and that there was "no adequate alternative[] to criminal trespass," he was not entitled to the necessity defense as a matter of law.[105]

The troubling aspect of this case is the court's decision that the defendant's actions would not actually stop the Iraq War because, as noted above, climate change protests will not actually stop the progression of climate change entirely. However, there is still an argument to be made that protesting climate change and using the

and it not surprisingly occurred in New York. People v. Archer, 143 Misc. 2d 390 (Rochester City Ct. 1988). However, on remand, the jury found the defendants guilty. *Id.* at 405.

101. *How Climate Is Changing*, NASA: GLOBAL CLIMATE CHANGE (April 19, 2019), https://climate.nasa.gov/effects/ [https://perma.cc/2373-EED4].

102. *See, e.g.*, Plumer, *supra* note 13.

103. *But see* Quigley, *supra* note 29; *see also* Long & Hamilton, *supra* note 7, at 160–61.

104. Muller v. Alaska, 196 P.3d 815, 816 (Alaska Ct. App. 2008); *see also* United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985).

105. *Muller*, 196 P.3d at 818. Interestingly, the defendant in this case had been convicted by a jury, even with the necessity defense presented. However, as he appealed and the court clarified that the defense was inapplicable as a matter of law, it will still be deemed unsuccessful for purposes of this Note. *Id.*

necessity defense could have a direct effect on climate change policy. First, as was shown in the case of the Keystone XL Pipeline, civil disobedience and protesting clearly had an impact on presidential policy, as it stopped, at least briefly, the increased use of dangerous fossil fuels in the United States.[106] Second, by committing illegal acts without a clear avenue to success in the court system, climate change protestors are taking a serious gamble that they might go to jail.[107] This acceptance of risk shows that protestors believe their actions to be so crucial that they are willing to lose their liberty to fight for them, which signals to lawmakers the seriousness of the issue. Third, by committing the acts and going to court, it opens a new public forum for their protests—the court system. Fourth, and finally, although attenuated, because any small increase in the climate could be devastating,[108] the logic follows that when a protestor is able to stop the production of energy at one energy plant, then the small amount of climate temperature rise avoided could have, although admittedly extremely small, an impact on climate change.

3. Nuclear Power and Weapons Plant Protests

Previously, individuals protested energy and weapons plants, not because of the threat of climate change, but rather, the environmental dangers associated with these failities. In *State v. Olsen*, defendant wanted to use the necessity defense to acquit himself from the charge of disorderly conduct when he and others blockaded the road leading out of a nuclear power plant.[109] The court denied the use of the necessity defense because Wisconsin's necessity defense statute is only available when the action is necessitated by natural physical forces, a requirement which the transportation of spent-fuel did not satisfy.[110]

Although at first glance the holding in this case may seem unfavorable to climate change protestors, the court's decision will most likely be limited to Wisconsin. This is because Wisconsin's necessity defense statute is extremely narrow and only applies to

106. *See supra* Introduction (discussing the impacts of protesting on President Obama's decision to shut down the Keystone XL Pipeline).

107. *See infra* Part III.B.1 (discussing the results of the *DeChristopher* case).

108. This idea was adopted by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 492 (2007).

109. State v. Olsen, 299 N.W.2d 632, 633 (Wis. Ct. App. 1980).

110. *Id.* at 634.

natural forces.[111] However, this interpretation of the necessity defense is not ubiquitous across jurisdictions, which means protestors might be better off simply avoiding protesting in these jurisdictions. Even within those narrow confines, one could argue that since climate change is the exacerbation of a natural phenomenon by human activity, it is by definition a natural force. Therefore, any action the protestors make would conceivably fall under the letter of the law, as acting "under 'pressure of natural physical forces.'"[112]

Protests of nuclear weapons processing facilities have also failed. In *People v. Weber*, protestors were convicted of trespass and obstruction of a street or sidewalk in front of a nuclear warhead manufacturing facility and United States naval base. The court consolidated the cases on appeal.[113] Comparing the threat of nuclear destruction to harms such as hunger and fear of crime, the court determined that the harm from nuclear destruction was not imminent, that there were legal alternatives available to the protestors, and therefore, the defendants should not have been able to present the necessity defense.[114]

As discussed previously, the imminence prong could be a difficult prong for climate change protestors to meet. However, at least in comparison to the possible use of nuclear weapons, it seems that the climate case is stronger. Unlike nuclear war, which depends on the decisions of humans to use nuclear weapons to create the threat, climate change is already occurring, and its effects are not possible, but probable, unless action is taken. While this point creates another difficulty for climate change litigation, climate change has a stronger case for being an imminent threat when compared to nuclear annihilation.

4. Human Trafficking

Defendants have also tried to use the necessity defense in the context of illegal human trafficking. In *United States v. Aguilar*,

111. *See* WIS. STAT. § 939.47 (2017).

112. *Olsen*, 299 N.W.2d at 634 (quoting WIS. STAT. § 939.47).

113. People v. Weber, 208 Cal. Rptr. 719, 720 (Cal. App. Dep't Super. Ct. 1984).

114. *Id.* at 721–22. Interestingly, a few of the cases that were consolidated on appeal had allowed the necessity defense to go to a jury; however, the court determined on appeal that it was error to instruct the jury on the necessity defense. *Id.* For an example of a similar case denying the defense based on the legal alternatives prong, *see* United States v. Montgomery, 772 F.2d 733, 736 (11th Cir. 1985); *see also* Andrews v. People, 800 P.2d 607 (Colo. 1990).

defendants "were convicted of masterminding and running a modern-day underground railroad that smuggled Central American natives across the Mexico border with Arizona."[115] The defendants' argument was that the smuggled individuals legally deserved asylum under United States law as political refugees, which the Immigration and Naturalization Service ("INS") had failed to effectuate.[116] The court held that the defendants were precluded from using the necessity defense, and made it clear that the defense had viable legal alternatives at their disposal.[117] For instance, the defendants could have gone through the appropriate INS channels, and if dissatisfied, could have appealed to the judiciary.[118] Moreover, the court went on to state that others had already effectuated change in INS policy through direct legal action against the INS.[119]

This case's holding is disadvantageous to climate change protestors. If the courts are willing to eliminate the necessity defense, whenever there are *any* legal alternatives, climate protestors will have a difficult time asserting the defense. However, if courts adopt a "reasonable legal alternatives" standard, as suggested by Long & Hamilton,[120] then climate protestors may still have a chance to use the defense. In addition, defendants might also argue that, unlike in the case of *Aguilar*, where petitioning the government eventually led to change in the INS system, legal alternatives have consistently failed climate change advocates.[121] As such, climate change litigants can distinguish their cases from the holding in *Aguilar*.

5. Indirect Civil Disobedience Claims in Federal Court and Some State Courts

As a general rule, climate change litigants will have more difficulty bringing indirect civil disobedience claims as opposed to direct civil disobedience claims. On the federal level, the Ninth Circuit has barred the use of the necessity defense as a matter of

115. United States v. Aguilar, 883 F.2d 662, 666 (9th Cir. 1989) (superseded by statute).
116. *Id.* at 667.
117. *Id.* at 693.
118. *Id.*
119. *Id.*
120. Long & Hamilton, *supra* note 25, 96–104.
121. *See id.* at 103–04.

law for actions of indirect civil disobedience.[122] At the state court level, there is more variability. However, there are clear examples of state courts banning indirect civil disobedience actions as well. One such case is *State v. Rein*.[123] In this case, protestors were arrested for trespassing and obstructing the legal process outside an abortion clinic.[124] In holding that the necessity defense was unavailable to the protestors, the court cited and seemingly adopted the *Schoon* holding that "as a matter of law [] the necessity defense is unavailable regarding acts of indirect civil disobedience."[125]

Even if the jurisdiction allows the necessity defense in indirect civil disobedience cases, it seems clear that climate litigants need to try and frame their actions in the form of direct civil disobedience.

6. Successful Claims in Generally Unsuccessful Categories

As noted in Part II.B.1, litigants have been successful in indirect civil disobedience cases. Moreover, as scholars have recognized, protests of nuclear power, nuclear arms, and war have been successful in unique circumstances.[126] Therefore, the lesson to be learned from the historical use of the necessity defense are the following: (1) the success of these claims heavily depends on the jurisdiction; (2) most types of necessity defense claims are possible with the right set of facts; and (3) it is imperative that the defendants provide ample evidentiary support of facts in the record, either through expert testimony or authoritative literature, to satisfy the imminence, gravity of harm, and the causation elements of the defense. Again, exactly how climate litigation defendants can accomplish these tasks will be discussed in Part IV.

122. United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991). Holdings in other circuits also seem to suggest that indirect civil disobedience will not withstand a motion *in limine*. *See* United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985); United States v. Kabat, 797 F.2d 580 (8th Cir. 1986); United States v. Santana, 184 F. Supp. 2d 131, 134–41 (D.P.R. 2001). While courts have generally held that acts of indirect civil disobedience should not have the ability to use the necessity defense, scholars have disagreed. *See generally, e.g.*, Cavallaro, *supra* note 67; Long & Hamilton, *supra* note 7; Long & Hamilton, *supra* note 25.

123. State v. Rein, 477 N.W.2d 716 (Minn. Ct. App. 1991).

124. *Id.* at 717.

125. *Id.* at 718.

126. *See, e.g.*, Quigley, *supra* note 29; *see also* Long & Hamilton, *supra* note 7, at 160–61.

III. CLIMATE CHANGE CASES AND THE NECESSITY DEFENSE

Before laying out this Note's theories on how to assert a successful defense, it is first necessary to examine several climate change cases where the necessity defense has been raised. Although these claims have been widely unsuccessful, an examination of these claims serves to shed light on why they have failed in the past, which will allow future climate change litigants to avoid the same mistakes.

A. History

Generally, the necessity defense has failed in climate change litigation. The CDP has recorded that there has been a total of twenty-eight attempted uses of the necessity defense in climate change cases across the United States.[127] In addition, as mentioned previously, the necessity defense has only been presented to a jury once.[128] Moreover, although the court allowed the defense to be presented, it did not allow the jury to decide the case based on necessity grounds.[129] While no single element of the necessity defense is dispositive in determining whether the argument will succeed, a common factor in failed climate change necessity defenses is either a failure to show a lack of a legal alternatives or lack of imminent harm.[130]

B. Previous Important Cases

1. *United States v. DeChristopher*

The first recorded case to use the necessity defense in climate change litigation was *United States v. DeChristopher*.[131] In *DeChristopher*, defendant purchased Bureau of Land Management ("BLM") oil and gas leases with the purpose of disturbing the

127. *See* CASE GUIDE, *supra* note 74.

128. Washington v. Brockway, No. 5053A-14D (Wash. Dist. Ct. Jan. 13, 2016).

129. CASE GUIDE, *supra* note 74, at 13–14. However, two cases are currently pending where the trial court judge has determined that the necessity defense can be presented to the jury. *See* Washington v. Taylor, No. 6Z0117975 (Wash. Dist. Ct. Oct. 16, 2017); State of Minnesota v. Klapstein, No. 15-CR-16-413 (Minn. Dist. Ct. Oct. 13, 2017).

130. *See* United States v. DeChristopher, 695 F.3d 1082, 1096 (10th Cir. 2012); People v. Bucci, No. 15110186, 2016 WL 8118170, at *5 (N.Y. Justice Ct. Dec. 1, 2016); *Brockway*, No. 5053A-14D; *see also* CASE GUIDE, *supra* note 74.

131. *DeChristopher*, 695 F.3d 1082.

auction and calling attention to the potential environmental harms of drilling.[132] When he did not pay, the defendant was prosecuted and convicted by a jury for interfering with a federal oil and gas lease provision and for making a false statement related to oil and gas leasing, both of which are violations of federal statutes.[133] As a result of his conviction, the defendant, Tim DeChristopher, was sentenced to two years in prison[134] and, in total, served twenty-one months of his sentence.[135]

Prior to his trial and conviction, the government moved to exclude the necessity defense argument, and defendant responded by providing "voluminous documentation of BLM's purported violations of various environmental laws and regulations as well as evidence about environmental issues such as global warming."[136] However, even with the copious amounts of evidence presented, the district court granted the government's motion.[137]

In the Tenth Circuit, to prove the right to use a necessity defense, "a defendant must show '(1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship exists between defendant's action and the avoidance of harm.'"[138] In affirming the district court's decision in *DeChristopher*, the Tenth Circuit held that they "need go no further than the first prong."[139] It was clear to the court that defendant could have filed suit to enjoin the leases, which other environmental groups had already done and had done so successfully.[140]

The case is important for a few reasons. First, it was the first case to mention climate change in relation to the necessity defense.

132. *Id.* at 1087.

133. *Id.* The statutes the defendant violated were 30 U.S.C. § 195(a)(1) (2016) and 28 U.S.C. § 1291 (2016).

134. *DeChristopher*, 695 F.3d at 1090. *See also* Suzanne Goldenberg, *US Eco-Activist Jailed for Two Years*, THE GUARDIAN (July 26, 2011), https://www.theguardian.com/world/2011/jul/27/tim-dechristopher-jailed-two-years [https://perma.cc/JH29-GRZP].

135. *Earth Day Exclusive: Tim DeChristopher Speaks Out After 21 Months in Prison for Disrupting Oil Bid*, DEMOCRACY NOW (April 22, 2013), https://www.democracynow.org/2013/4/22/earth_day_exclusive_tim_dechristopher_speaks [https://perma.cc/2YYX-ZRHU].

136. *DeChristopher*, 695 F.3d at 1088.

137. *Id.*

138. *Id.* at 1096 (quoting United States v. Baker, 508 F.3d 1321, 1325 (10th Cir. 2007)).

139. *Id.*

140. *Id.* at 1096–97.

Second, and more importantly, it shows the difficulty of bringing necessity defense claims in federal court.[141] Although the court did not mention it specifically, it refused to allow a defendant committing an act of indirect civil disobedience to use the defense when there were *any* other legal alternatives available to the defendant. This refusal creates a heavy burden on the defendant to consider *every* single legal alternative available. Third, the defense is not a balancing test, and therefore, a defendant must prove every prong of the defense in order to be successful. Fourth, and finally, it is extremely difficult to make the necessity defense argument when other individuals are successfully attacking the potential harm through legal mechanisms.

2. *People v. Shalauder*

In *People v. Shalauder*, defendants were arrested for failure to disperse during a protest in lower Manhattan, which was aimed at halting the financial practices of institutions that have damaging effects on the environment.[142] In asserting their defense, the defendants first claimed that the court should take judicial notice of the "scientific consensus on the imminent harm caused and threatened by climate change" because of reports issued by government organizations asserting and confirming that point.[143] In arguing for the applicability of the necessity defense, the defendants cited *People v. Gray*, maintaining:

> Here, the defendants believe, and a scientific and legislative consensus exists, that global climate change is more than imminent, but has already substantially occurred; that its impact is highly destructive and becoming worse; and that immediate action is

141. Although the defendant failed, some have noted that:

> [M]ost of the BLM leases targeted by the defendant were soon canceled as a direct result of the protest action and the attention it drew to the federal government's violation of environmental assessment requirements. This precedent may be useful for proving a defendant's anticipation of a direct connection between protest and aversion of climate harms.

CASE GUIDE, *supra* note 74, at 19.

142. Trial Memorandum of Law for Shalauder at 1, People v. Shalauder, No. 2014NY076969 (N.Y. Crim. Ct. March 5, 2015); *see also* CASE GUIDE, *supra* note 74, at 14–15; Kate Aronoff, *The Flood Wall Street 10 Fought the Law and Won*, WAGING NONVIOLENCE (Mar. 7, 2015), https://wagingnonviolence.org/2015/03/flood-wall-street-10-fought-law-won/ [https://perma.cc/W8VT-RYRN].

143. Trial Memorandum of Law for Shalauder at 2, People v. Shalauder, No. 2014NY076969.

> required to avert the worst harms from happening. As in the cited cases, defendants' actions did not question, but were in accordance with the goals of, federal and New York state environmental law. Defendants merely call for more effective enforcement, not a radical change in law, and were on Wall Street demanding that the financial companies which were the target of their protests act in accordance with the law.[144]

In making its determination on the ability of protestors to use the necessity defense, the court followed N.Y. Penal Law § 35.05(2) and *People v. Craig*.[145] Although it recognized the potential harm caused by climate change, the court denied the use of the defense for a few reasons. The court noted that the "rare and highly unusual circumstances" which would constitute an imminent threat, were simply not met by climate change. It also noted that there was presently no specific "corporate act about to be taken or about to occur to any identifiable individual that might potentially be prevented by defendant's conduct."[146] Finally, the court stated that reasonable legal alternatives existed.[147]

However, in denying the necessity defense request, the court made critical determinations that could be useful for litigants in the future.[148] For instance, the court stated that "no expert testimony would be necessary" to prove "the grave environmental dangers posed by a failure to address it," as "the Court ha[d] taken judicial notice of those obvious truths."[149] In addition, the court actually acquitted the defendants based on their First Amendment right to protest.[150]

3. *Washington v. Brockway*

In *Washington v. Brockway*, defendants were charged with trespass and obstruction of train traffic when they obstructed the tracks of a railyard to impede crude oil transport "in protest of the government's lack of action on climate change and the continued

144. *Id.* at 5–6.

145. Transcript Excerpt of Record at 3–4, People v. Shalauder, No. 2014NY076969 (N.Y. Crim. Ct. March 4, 2015).

146. *Id.* at 4–6.

147. *Id.* at 6.

148. *See* CASE GUIDE, *supra* note 74, at 14–15; Long & Hamilton, *supra* note 7, at 167–68.

149. Transcript Excerpt of Record at 2, People v. Shalauder, No. 2014NY076969.

150. *See id.*

expansion of fossil fuel infrastructure in Washington State."[151] The judge originally allowed the defendants to present the necessity defense to the jury.[152] As a result, at trial, the defendants were able to use an expert to testify on the damaging effects of climate change and past failed legal actions taken to thwart it.[153] Although the court denied the jury the ability to consider the necessity defense as a matter of law, it once again acknowledged the pressing need to address climate change. Nonetheless, the court reasoned that based on facts presented, there were other reasonable legal alternatives available to the defendants, which precluded the defendants' use of the defense.[154]

The case did not end here, however, as the defendants appealed the decision to the appellate court. In their brief in support of reversing the trial court's determination, the defendants claimed that the trial court judge "adapted an unduly limited construction of the phrase 'reasonable legal alternatives'" and should have allowed the jury, not the judge, to determine what *reasonable* means.[155] In making this argument, the defendants claimed that "reasonable" means "effective," not "available," which would have allowed the jury to consider whether the defendant's previous legal efforts had been futile or not.[156] In addition, an amicus brief filed

151. Long & Hamilton, *supra* note 7, at 168.

152. *Id.* at 170–71. The requirements for the necessity defense in Washington state are as follows:

> Necessity is a defense to a charge of (fill in crime) if
> (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and
> (2) harm sought to be avoided was greater than the harm resulting from a violation of the law; and the
> (3) the threatened harm was not brought about by the defendant; and
> (4) no reasonable legal alternative existed.
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL ch. 18.02 (4th ed. 2016); *see also* Opening Brief for Brockway at 15–16, Washington v. Brockway, No. 76242-7-I (Wash. Ct. App. Aug. 8, 2017).

153. Long & Hamilton, *supra* note 7, at 171.

154. *Id.* at 172.

155. Opening Brief for Brockway at 16–18, Washington v. Brockway, No. 76242-7-I.

156. *Id.* at 17–18.

by the CDP, reiterated the arguments made by the defendants,[157] and made an additional argument that the harms to be avoided also stemmed from the public trust doctrine, which is a "doctrine [that] requires the government to hold vital natural resources in trust [for,] . . . public beneficiaries, both present and future generations."[158] In essence, the argument claims that damages to the public trust resources, resulting from climate change, make the harm from climate change immediate and personal.[159]

Clearly, the original trial court had a difficult time deciding whether to allow the necessity defense to be used in the case. The court's back-and-forth treatment of the issue can be seen in the reasoning of the decision as well as in the language of the final ruling, which states "I am bound by legal precedent no matter what my personal views may be on these topics."[160] This lack of clarity, similar to *Shaulder*, might be the impetus needed for the appellate court to overturn the trial court's ruling.[161] Either way, this case illustrates that with the proper factual basis, stemming from expert testimony and a more expansive interpretation of the term "reasonable legal alternatives," a defendant might have an opportunity to present the necessity defense in a climate change action.[162]

4. *People v. Bucci*

In *People v. Bucci*, the defendants were charged with disorderly conduct for blocking the parking lot of an area where workers, who were removing a natural gas pipeline and replacing it with a larger natural gas pipeline, were parked.[163] The protest was based on the belief that the pipeline was dangerous and harmful to the

157. Brief for Climate Defense Project as Amicus Curiae Supporting Petitioners at 9–13, Washington v. Brockway, No. 76242-7-I (Wash. Ct. App. Nov. 17, 2017).

158. *Id.* at 4 (omissions in original).

159. *Id.* at 9.

160. A full analysis of the trial court's actions is summarized by Long and Hamilton. *See* Long & Hamilton, *supra* note 7, at 168–172.

161. *Id.* at 172 (quoting Transcript of Record at 89, Washington v. Brockway, No. 5053A-14D (Wash. Dist. Ct. Jan. 13, 2016)).

162. Unfortunately, the court of appeals affirmed the trial court's refusal to instruct the jury on the necessity defense because of available legal alternatives. Washington v. Brockway, No. 76242-7-I, at 11 (Wash. Ct. App. May, 29, 2018). However, the court did make it clear that the "necessity defense may available in actions involving civil disobedience." *Id.*

163. People v. Bucci, No. 15110186, 2016 WL 8118170, at *1, 3 (N.Y. Justice Ct. Dec. 1, 2016).

environment, and that the increased use of energy would add to the problems associated with climate change.[164] However, in denying the defendants' necessity defense,[165] the court stated that the harms they were protesting were "subjective and speculative personal views and opinions of the defendants," which did not rise to the type of "imminent or emergency situation" required to assert the defense.[166]

An important distinguishing factor in this case is that the project had already been approved after public debate by the Federal Energy Regulatory Commission ("FERC").[167] In blocking the roadway, defendants were charged with disorderly conduct.[168] Therefore, this case is illustrative of an inherent problem in using the necessity defense in climate change cases, especially when a project has government approval. As was the case here, FERC, a government organization responsible for issuing necessary permits, had held hearings on the project and had made a determination that the plan should go forward.[169] In the case of most governmental actions related to the environment, especially when EPA is involved, these types of hearings are almost ubiquitous. As such, it seems unlikely that a necessity defense, even in a favorable jurisdiction like New York, will succeed when a government organization follows proper procedures and comes to the conclusion that the action is safe. In such cases, defendants will need to argue that the government agency failed to take into account important considerations, such as the overall effect of the permit or project on climate change, when making its determination.

164. *Id.* at *4; *see also* Trial Memorandum for Defendant, People v. Bucci, No. 15110186, at *3–4 (N.Y. Justice Ct. Jan. 15, 2016). It should also be noted, that like in Shaulder, the defendants requested that the court take judicial notice as to the harms associated from the pipeline. *Id.* at *5. This argument seems futile because FERC had already approved the project, and thus, this argument would not be as strong as the case made in *Shaulder*.

165. As discussed previously, the necessity defense in New York is codified by statute. *See* N.Y. PENAL LAW § 35.05(2) (McKinney 2016).

166. Bucci, No. 15110186, 2016 WL 8118170, at *5.

167. *Id.* at *1.

168. *Id.* at *1–2.

169. *Id.* at *1.

C. Two Recent Cases

1. *State v. Klapstein*

In *State v. Klapstein*, a fairly recent Minnesota case, decided in October of 2017, defendants were charged with trespass and damage to the property of a public utility when the defendants used bolt cutters to cut a hole in the fence of a United States–Canada tar sands pipeline facility.[170] As a result of the defendants' actions, the company shut down the pipelines themselves before the defendants were able to do so as part of their protest.[171] The defense argued that when "[f]aced with the decision regarding whether to sit passively and watch global warming ravage the planet, or to take action to address the crisis, the defendants decided to engage in the long American tradition of civil disobedience."[172]

The law on the necessity defense in Minnesota is as follows:

> [T]o successfully assert the [necessity] defense, a criminal defendant must show that the harm that would have resulted from obeying the law would have significantly exceeded the harm actually caused by breaking the law, there was no legal alternative to breaking the law, the defendant was in danger of imminent physical harm, and there was direct causal connection between breaking the law and preventing the harm.[173]

The trial court judge noted that this is a high standard.[174] Therefore to bolster their argument and satisfy the necessary

170. State v. Klapstein, No. 15-CR-16-413 (Minn. Dist. Ct. Oct. 13, 2017); Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity, State v. Klapstein, 15-CR-16-413 at 1–2 (Minn. Dist. Ct. Feb. 3, 2017). *See also* Lauren McCauley, *'This Is My Act of Love': Climate Activists Shut Down All US-Canada Tar Sands Pipelines*, COMMON DREAMS (Oct. 11, 2016), https://www.commondreams.org/news/2016/10/11/my-act-love-climate-activists-shut-down-all-us-canada-tar-sands-pipelines [https://perma.cc/S7AJ-D[JP]; Phil McKenna, *Judge Allows 'Necessity' Defense by Climate Activists in Oil Pipeline Protest*, INSIDE CLIMATE NEWS (Oct. 16, 2017), https://insideclimatenews.org/news/16102017/climate-change-activists-arrest-pipeline-shutdown-necessity-defense [https://perma.cc/V5MY-AMXQ].

171. *See* McCauley, *supra* note 170.

172. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 2, State v. Klapstein, 15-CR-16-413.

173. *Klapstein*, 15-CR-16-414 at 5 (citing State v. Rein, 477 N.W.2d 716, 717 (Minn. App. 1991)).

174. *Id.*

criteria, the defendants used various legal techniques in their motion papers: (1) they cited governmental publications, scientific papers, Supreme Court opinions, and newspaper articles to show that the harms from climate change avoided by their actions significantly outweighed the harm from shutting down the facility;[175] (2) they documented the defendants' failed attempts to effect change through proper legal channels, such as through public hearing testimony;[176] (3) they cited *Massachusetts v. EPA* to show that the threat from climate change was imminent;[177] (4) they made the argument that every incremental decrease in fossil fuel emissions leads to a decrease in the damaging effects of climate change, thereby causally connecting the defendants' actions to thwarting climate change;[178] and (5) they argued that their actions were justified based on the public trust doctrine.[179] In essence, the defendants took painstaking measures to address each element required to sufficiently assert the necessity defense in the jurisdiction.

Due to those efforts, and despite the high standard required for the necessity defense in Minnesota, the court granted the defendants' request to present the necessity defense at trial.[180] Not surprisingly, the state appealed the trial court's ruling.[181] Despite the appeal, the trial court's ruling and the defendant's brief in support of the necessity defense are illustrative of the detailed analysis required for climate change litigants to successfully use the defense in future cases.[182]

175. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 10–20, State v. Klapstein, 15-CR-16-413.

176. *Id.* at 20–25.

177. *Id.* at 25.

178. *Id.* at 25–28.

179. *Id.* at 28–31.

180. *Klapstein*, 15-CR-16-414 at 6. The court's decision came as a surprise to many. *See, e.g.*, McKenna, *supra* note 170.

181. For an example of brief written from the rare position as a respondent in these cases, see Brief of Law Professors and Legal Education Organizations as Amici Curiae in Support of Respondents, State v. Johnston, No. A17-1649 (Minn. App. Dec. 4, 2017).

182. On appeal, the court of appeals determined that the presentation of the necessity defense could proceed forward. State v. Klapstein, 15-CR-16-414 (Minn. Ct. App. Apr. 23, 2018). The court held that it was too speculative to determine that the trial court's ruling would have a "critical impact on the state's ability to prosecute." *Id.* at 4, 6–7. The state again tried to appeal, but the Supreme Court of Minnesota refused to grant their petition for review. *See Climate Activists Win in Minnesota Supreme Court, Setting Stage for Historic Climate Necessity Trial*, CLIMATE DEF. PROJECT (July 17, 2018), https://climatedefenseproject.org/climate-activists-win-in-minnesota-supreme-court-setting-stage-for-historic-climate-

2. *Washington v. Taylor*

In an even more recent decision, a defendant was charged with trespass and obstructing or delaying a train when he entered onto the property of Burlington Northern Santa Fe ("BNSF") and "lined the rail tracks, held up signs, chanted, and unfurled large banners protesting rail transport of coal and oil. Journalists circulated and interviewed various supporters."[183] The purpose of the trespass was to protest the use of fossil fuels, specifically of oil and coal, and its effect on climate change, as BNSF serviced various oil and coal refineries.[184]

To properly assert the necessity defense in Washington State, the defendant must show:

> (1) [T]he defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and (2) harm sought to be avoided was greater than the harm resulting from a violation of the law; and (3) the threatened harm was not brought about by the defendant; and (4) no reasonable legal alternative existed.[185]

To satisfy all of these elements, the defendant filed a motion prior to the hearing on the necessity defense, in which he laid out who his expert witnesses would be and what he expected their testimony to show.[186] Moreover, at the actual necessity defense hearing, the defendant offered testimony from a climate change expert to show the harmful impacts of fossil fuels on the earth's climate, the

necessity-trial/ [https://perma.cc/5H2C-X59J]. When the case went to trial, the court dismissed the case after the prosecution rested due to a lack of sufficient evidence to convict the defendants on the charges. *See* Climate Defense Project, *Victory in Minnesota: Valve Turners Acquitted of All Charges*, CLIMATE DEF. PROJECT (Oct. 9, 2018), https://climatedefenseproject.org/victory-in-minnesota-valve-turners-acquitted-of-all-charges/.

183. Defense Motion to Allow Affirmative Defense and To Call Expert Witness at Trial at 1–2, State v. Taylor, No. 6Z0117975 (Wash. Dist. Ct. Apr. 24, 2017).

184. *Id.*

185. State v. Swofford, 2017 WL 5499890, at *3 (Wash. Ct. App. Nov. 16, 2017) (citing Wash. Supreme Court Comm. on Jury Instructions, Washington Pattern Jury Instructions: Criminal ch. 18.02 (4th ed. 2016)).

186. Transcript of Hearing at 9–12, State v. Taylor, No. 6Z0117975 (Wash. Dist. Ct. June 26, 2017).

imminence of the threat,[187] and the lack of the current executive administration's policies to thwart the threat.[188] The defense also had an expert testify to show that civil disobedience can lead to social change;[189] that civil disobedience applied to climate change;[190] and the exhaustive legal measures defendants had already taken before using civil disobedience.[191]

The trial court was clearly influenced by the comprehensive expert testimony. In its opinion discussing its findings of facts and conclusions of law following the hearing, the court laid out, point-by-point, the defendant's testimony, the prosecution's expert testimony, and the defense's expert testimony.[192] In holding that the necessity defense could proceed, the court cited the defendant's constitutional right to present a defense.[193] The court also provided examples of when the use of the necessity defense had been allowed in various other types of cases.[194] Finally, it determined that through the testimony of the defendant and the defendant's experts, "the Defendant met the burden of proof by satisfying the four elements required to present the Necessity Defense by a preponderance of the evidence."[195]

Therefore, it appears that the use of defendant's experts paid off. The results of *Taylor* and *Klapstein* illustrate that to have the opportunity to present a necessity defense, at a minimum, defendants must be able to provide not only credible expert testimony as to all elements of the defense, but most importantly, the expert must also apply and explain how the specific facts of the case necessitate the need to use civil disobedience as opposed to typical legal alternatives.

187. *Id.* at 12–31.
188. *Id.* at 30.
189. *Id.* at 54–59.
190. *Id.* at 59–60.
191. *Id.* at 60–61.
192. Washington v. Taylor, No. 6Z0117975, at 3–8 (Wash. Dist. Ct. Mar. 13, 2018).
193. *Id.* at 9.
194. *Id.*
195. *Id.* at 10–11; *see also For Second Time in a Week, A Judge Allows Climate Necessity Defense, Signaling Shift in Legal Landscape*, CLIMATE DEF. PROJECT (Oct. 17, 2017), https://climatedefenseproject.org/second-time-week-judge-allows-climate-necessity-defense-signaling-shift-legal-landscape/ [https://perma.cc/2AYT-29EV]. It should be noted that this case was appealed by the state. *See State v. Taylor*, SABIN CTR FOR CLIMATE CHANGE L.: CLIMATE CASE CHART, http://climatecasechart.com/case/state-v-taylor/ [https://perma.cc/AF9Q-24HK] (last visited Apr. 22, 2019).

IV. GUIDANCE FOR ATTORNEYS COUNSELING CLIENTS AND ASSERTING THE NECESSITY DEFENSE

The recent more favorable decisions provide hope for environmental litigators seeking new avenues to combat climate change, as the necessity defense might provide one such avenue. This Part will provide attorneys with the tools and knowledge they need to properly advise their clients and present the best possible necessity defense. To do so, this Part will describe techniques to use pre-demonstration, and provide an analysis of techniques to use after arrest.

A. Guidance Prior to and During the Demonstration

A successful necessity defense claim does not start after arrest. Instead, it takes a concerted effort before the protest begins. Although the lawyer's role is limited prior to the crime due to ethical concerns, as will be discussed below, lawyers can still provide limited guidance that might be critical in the long-term.

1. Deciding Where to Protest

In necessity defense cases, the jurisdiction of the tribunal could make or break the defense. As we saw in Part I.C there is precedent in federal court, at least in the Ninth Circuit, for the court to refuse to allow the defendant to assert a necessity defense in any indirect civil disobedience cases.[196] However, even where a jurisdiction does not have a complete ban on indirect civil disobedience, elements of the defense vary. Additionally, it might be important to know whether the jurisdiction allows the defense by common law or statute[197] because while common law generally accepts the necessity defense, the Supreme Court has not completely endorsed the defense,[198] and there is no guarantee that the Supreme Court or other state courts will continue to allow the defense based on the common law.[199]

196. *See* United States v. Schoon, 971 F.2d 193, 199–200 (9th Cir. 1991).

197. *Compare* N.Y. PENAL LAW § 35.05(2) (McKinney 2016), *with* State v. Klapstein, No. 15-CR-16-413 (Minn. Dist. Ct. Oct. 13, 2017) (citing State v. Rein, 477 N.W.2d 716, 717 (Minn. App. 1991)). For a guide to the requirements for each jurisdiction in the United States, see JURISDICTION GUIDE, *supra* note 36.

198. *See* United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 490 (2001).

199. The author recognizes this is an unlikely scenario, but mentions it purely to acknowledge its potential.

Notwithstanding the variation in the elements of the defense, or if it is based on common law or statutory law, how courts apply the defense could vary drastically. For example, while the majority of abortion cases that tried to assert the necessity defense failed, one jurisdiction, New York, did allow the case to go to a jury.[200] In addition, New York allowed a bridge protest case related to air pollution to go to a jury.[201] Therefore, if advising a client, an attorney must be cognizant of the jurisdiction's previous case law and treatment of the defense. An attorney should also consider that while being in the right jurisdiction does not guarantee success in court,[202] it could be helpful to be in a jurisdiction that has a statutorily based necessity defense; has been willing to allow the defense in the past; and does not have a complete ban on indirect civil disobedience.

Nonetheless, choosing the jurisdiction might not always be an option. Many times, climate change protestors wish to make a demonstration in an area close to home, which has a connection not only to climate change, but also to their local environment.[203] In addition, at least for the types of offenses typically committed in protests cases (e.g., trespassing), which are generally state law related offenses, it might be impossible to be heard in federal courts due to the federal court's lack of subject matter jurisdiction over the causes of action.[204]

200. *Compare* People v. Archer, 143 Misc. 2d 390 (N.Y. City Ct. 1988), *with* Bird v. Municipality of Anchorage, 787 P.2d 119 (Alaska Ct. App. 1990).

201. *See* People v. Gray, 150 Misc. 2d 852, 855 (N.Y. Crim. Ct. 1991). Another appealing aspect of the jurisdiction of New York is that the necessity defense is not an affirmative defense, but rather, just a defense. Thus, once the *prima facie* case is made out for the defense, the burden falls back on the government. *See* People v. Craig, 78 N.Y.2d 616, 620 n.1 (1991). ("Justification is a defense, not an affirmative defense. If a defendant's conduct is justified on the ground of necessity or choice of evils under Penal Law § 35.05(2), it is not unlawful.").

202. CLIMATE DISOBEDIENCE CTR., THE CLIMATE NECESSITY DEFENSE: A LEGAL TOOL FOR CLIMATE ACTIVISTS 10 (2016) [hereinafter PAMPHLET].

203. *See, e.g.*, People v. Bucci, No. 15110186, 2016 WL 8118170 (N.Y. Justice Ct. Dec. 1, 2016).

204. Of course, if trespassing on federal property, then there could be subject matter jurisdiction in those particular cases based on the individual's violation of a federal statute. *See* 18 U.S.C. §§ 1382, 1752 (2018) (criminalizing trespass on various forms of military property and certain government buildings, such as the White House).

2. Exhaust All Legal Remedies

Although state statutes differ, all jurisdictions which allow the necessity defense require that the defendant have no reasonable legal alternatives. Therefore, attorneys should recommend that potential protestors exhaust all legal remedies prior to committing acts of civil disobedience.[205] In the two situations where the court has allowed the necessity defense protest in climate change cases, the defendants made it clear in the record that they had tried actively to combat the issues through typical legal means.[206] Such avenues include, but are not limited to: public protests without committing any illegal acts, taking part in public hearings, writing to a local representative or congressperson, and filing lawsuits against governmental organizations that have failed to act in the past.[207] If these avenues are taken, and relief is still lacking, then the defendants may have a stronger case for a necessary act of civil disobedience.[208]

3. Deciding How to Conduct the Protest

An attorney should advise clients that how they conduct themselves during protests may influence their legal outcome. The attorney should advise the client that when conducting oneself in these activities one should act as orderly and responsibly as possible.[209] If the protest is done in an irresponsible manner and the harm created grows, this lack of restraint will play a role in the court's balancing of the choice of evils requirement, which could be devastating to the defense.[210] Therefore, although attorneys cannot help clients plan protests, as that would breach the rules of legal ethics,[211] protestors must remember that although they are acting illegally, they should protest in the most efficient, respectful, and least harmful way possible. This necessitates that protestors do

205. *See* Hernández, *supra* note 7, at 320–21.

206. *See* Transcript of Hearing at 60, State v. Taylor, No. 6Z0117975 (Wash. Dist. Ct. June 26, 2017); Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 20–23, State v. Klapstein, No. 15-CR-16-413 (Minn. Dist. Ct. Oct. 13, 2017); *see also* PAMPHLET, *supra* note 202, at 10.

207. *See* Long & Hamilton, *supra* note 25, at 99–100.

208. *See* Transcript of Hearing at 58, State v. Taylor, No. 6Z0117975 ("[Q]uite often [civil disobedience is] the only hope is to continue into the realm of nonviolent resistance.").

209. PAMPHLET, *supra* note 202, at 11.

210. *See* Hernández, *supra* note 7, at 316.

211. *See infra* Part IV.A.4.

not destroy property unnecessarily or harm any individuals, as these actions would make the use of the defense more difficult.

4. Ethical Issues

In providing advice before an act of civil disobedience, an attorney must be cognizant of his or her ethical requirements. The American Bar Association's ("ABA") Model Rules of Professional Conduct ("MRPC") provides guidelines for ethical practice. The ABA rules are simply model rules; however, many states have adopted and follow the MRPC.[212] Therefore, the MRPC is a good reference point for the general rules attorneys ought follow throughout the country.

One such model rule, MRPC Rule 2.1, states that when "render[ing] candid advice . . . a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."[213] The language in this rule fits nicely with what a climate change attorney's goal might be. When acting within a politically charged area such as climate change, it will be helpful to provide advice, not based solely on the law, but also based on the moral, social, and political caveats of the protest.

However, the ABA also provides important limitations that are relevant to advice given before acts of civil disobedience occur. Rule 1.2(d) states:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[214]

Although this rule seems quite clear, it does not define exactly what

212. In fact, to date, every single state has adopted the Model Rules, except for California. AMERICAN BAR ASS'N, STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (2017). Thirty-seven states have adopted the rules and comments, seven states have adopted the rules, but the not the comments, and six states have adopted the rules with no comments. *Id.*

213. MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018). For an extended analysis of how the Model Rules can be amended to be more environmentally friendly, see Tom Lininger, *Green Ethics for Lawyers*, 57 B.C. L. REV. 61 (2016).

214. MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2018).

constitutes criminal behavior. However, it could be assumed that the more drastic the crime, the more culpable the attorney might be for assisting the client in their illegal activity. An extreme example of an attorney suffering severe consequences for helping his client commit a crime is the recent case of securities fraud against Martin Shkreli.[215] In this case, Shkreli committed an elaborate crime through "a series of settlement and sham consulting agreements" all with the help of his attorney Evan Greebel. At trial, a jury found Greebel guilty of conspiracy to commit wire fraud and securities fraud,[216] for which, he was sentenced to eighteen months in prison.[217]

Moreover, in further clarifying the rule, a comment to Rule 1.2(d) explains:

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.[218]

Thus, lawyers representing climate change protestors are put in a delicate position. The rule allows the attorney to provide advice on the legal consequences of the protests, but does not allow them to go so far as to recommend "the means by which a crime or fraud might be committed with impunity."[219]

Finally, once the illegal conduct has begun, namely, the act of civil disobedience, the "lawyer is required to avoid assisting the

215. *See* United States v. Shkreli, No. 15-CR-637, 2016 WL 8711065 (E.D.N.Y. Dec. 16, 2016).

216. Jan Wolfe & Nate Raymond, *Martin Shkreli's Former Lawyer Convicted of Helping Him to Defraud Pharmaceutical Firm*, HUFFPOST (Dec. 28, 2017, 4:50 AM), https://www.huffingtonpost.com/entry/evan-greebel-convicted-fraud_us_5a44ba3de4b0b0e5a7a4b0aa [https://perma.cc/M8KX-UR62].

217. David Z. Morris, *Martin Shkreli's Lawyer Sentenced to 18 Months in Prison*, FORTUNE (Aug. 18, 2018), http://fortune.com/2018/08/18/martin-shkreli-lawyer-sentenced-prison/ [https://perma.cc/3DP6-EGFN].

218. MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 9 (AM. BAR ASS'N 2018).

219. *Id.*

client."[220] Therefore, once a climate change activist begins an act of civil disobedience, the MRPC requires the attorney to avoid offering any type of assistance or face violation of the rules of ethics.

B. Guidance After Demonstration and Arrest

Once the client has committed their act, has been charged, and is facing trial, an attorney must carefully prepare his or her arguments to present the necessity defense, which requires consideration of numerous factors.

1. Know What the Jurisdiction Requires

As has been mentioned repeatedly throughout this Note,[221] it is imperative that an attorney know what the jurisdiction requires to successfully assert the defense. Each jurisdiction varies slightly, and therefore, without this proper knowledge, an attorney might attempt to satisfy a burden that they do not need to meet, or may fail to provide the necessary evidence for an element that is required. In either case, at the most basic level, a climate change attorney should familiarize oneself with the required elements of the necessity defense in the jurisdiction of the case.

2. Frame the Case in Terms of Direct Civil Disobedience, If Possible

Once determining the elements that must be proven, the attorney can start to craft the substance of the claim. While doing so, the attorney should remember that courts tend to be more willing to allow the defense to proceed in direct civil disobedience cases. Therefore, attorneys should try and frame the defendants' actions in terms of direct civil disobedience as opposed to indirect disobedience to avoid having a necessity defense claim thrown out of certain courts immediately.[222]

In the context of climate change, this is a difficult burden to meet, as the motivation behind the protest is to thwart climate

220. *Id.* r. 1.2(d) cmt. 10.

221. For a more detailed analysis of why jurisdiction knowledge is so important, see *supra* Part IV.A.1.

222. *See* Hernández, *supra* note 7, at 317–18; *see also supra* Part I.B–C (illustrating the point that direct acts of civil disobedience tend to be more likely to succeed than indirect actions).

change, not to protest the law they are breaking, which is generally trespass or disorderly conduct. However, it is not always easy to distinguish between direct and indirect civil disobedience,[223] which provides attorneys room to argue to the trial court.

In fact, in *Klapstein*, the attorneys made that exact argument. Defendants' counsel argued:

> Given the phenomenon of the climate "tipping point," in which any given quantum of combusted fossil fuels could push the atmospheric system into irreversible instability (discussed above), and considering that every bit of increased greenhouse gas emissions degrades the climate, the temporary shut-down of tar sands oil flowing through Enbridge pipelines directly averted some degree of harm. Similarly, the laws that the defendants violated were not an "indirect" method for targeting unrelated policies. Insofar as they protect the property and operations of fossil fuel corporations whose activities harm the world's climate, the laws themselves are a source of injury to the public. Climate change is caused not only by the extraction and burning of fossil fuels, but also by the web of laws that encourage and protect such harmful conduct. In openly violating some of those statutes, the defendants were directly challenging unjust laws.[224]

This is a unique argument, which, if accepted by most courts, would make all actions of civil disobedience related to climate change direct actions of civil disobedience, rather than indirect actions. Although there is no way of knowing if the court specifically adopted this argument when it granted the defense's motion to present the necessity defense, at the very least, it did not condemn it. Thus, it would seem prudent for climate change attorneys, as the defendant did in *Klapstein*, to try and frame their clients' actions in terms of direct civil disobedience.

3. Have Credible Experts, Reports, and Government Declarations Available on Imminence and Gravity of Harm

One of the main issues with the use of the necessity defense in climate change cases is the inability to meet the imminence of harm prong. This is due to the fact that the anthropogenic climate

223. Cohan, *supra* note 10, at 115 ("It may be difficult to make a clear distinction between direct and indirect civil disobedience.").

224. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 25, State v. Klapstein, 15-CR-16-413 (Minn. Dist. Ct. Feb. 3, 2017); *see also* Long & Hamilton, *supra* note 25, at 107–8.

change is not fast acting. As a result, courts have been reluctant to find that the threats from climate change meet the imminence standard.[225]

However, to counteract a court's reluctance, a climate change litigant can provide ample support from various authorities to help the court feel more comfortable determining that the threat from climate change is imminent enough to meet the legal standard. Such support should come from climate science experts, previous legal precedent, if possible,[226] and perhaps most importantly, government declarations from the town, city, state, or nation where the action will take place, if available.[227]

In the two more recent climate change cases, *Klapstein* and *Taylor*, and the most analogous non-climate change case, *Gray*, the defendants took painstaking efforts to provide support from experts, courts, and government declarations to show both the imminence and the gravity of climate change.[228] Although there is no guarantee that even the most detailed factual support will satisfy the court,[229] it seems essential for the claim to go forward.

225. *See, e.g.*, Transcript Excerpt of Record at 4–6, People v. Shalauder, No. 2014NY076969 (N.Y. Crim. Ct. March 4, 2015).

226. The most authoritative case to claim that climate change was imminent came from the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007).

227. Despite the current administration's reluctance to accept the dangerous nature of climate change, a recent report written by thirteen federal agencies shows the damaging effect of humans' impact on the environment. *See* Lisa Friedman & Glenn Thrush, *U.S. Report Says Humans Cause Climate Change, Contradicting Top Trump Officials*, N.Y. TIMES (Nov. 3, 2017), https://www.nytimes.com/2017/11/03/climate/us-climate-report.html [https://perma.cc/7U3K-GAUF]; *see also* USGCRP REPORT, *supra* note 2. Some states' websites even provide evidence of the damaging effect of climate change already occurring. *See Impacts of Climate Change in New York*, N.Y. DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/energy/94702.html [https://perma.cc/M9VD-5FZN] (last visited Jan. 6, 2018). In addition, the expert's might not be necessary if the court is willing to take judicial notice of the harmful effect of climate change. *See supra* Part III.B.2.

228. *See* Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 10–31, State v. Klapstein, 15-CR-16-413; Transcript of Hearing at 9–12, State v. Taylor, No. 6Z0117975 (Wash. Dist. Ct. June 26, 2017); People v. Gray, 150 Misc. 2d 852, 859–65 (N.Y. Crim. Ct. 1991).

229. Even with the detailed expert testimony in *Brockway*, the court still failed to allow the defense to proceed. *See* Long & Hamilton, *supra* note 7, at 171.

4. Frame the Legal Alternatives Prong in Terms of Reasonable Alternatives and Provide Evidence of Other Types of Legal Relief Already Attempted

If a court determines that other legal action is available, then the necessity defense will fail. Therefore, to avoid that determination, a climate change attorney needs to try and frame his argument in the form of "reasonable legal alternatives" as opposed to "any other legal action," since there is almost always at least some type of legal alternative available to defendants.[230] In a climate change case, the attorney can then proceed to provide ample support of the previous legal means by which their client has already attempted to bring about the change sought when they committed the act of civil disobedience.

Again, to show how to do this effectively, *Klapstein* and *Taylor* are prime examples. In *Klapstein*, counsel for the defendants included explicitly in their brief the legal activities that their clients attempted prior to committing the act.[231] In *Taylor*, an expert testified for the defense and asserted that he believed the defendants had attempted reasonable legal alternatives to civil resistance prior to their actions.[232] Without these critical arguments and expert testimony, it does not seem likely that the defendants would have been successful. Thus, attorneys should have arguments ready to frame the case in terms of "reasonable legal alternatives," and then provide evidentiary support for the previous legal acts done by their clients prior to using civil disobedience.

5. Frame the Activity as Directly Related to Halting Climate Change

If a jurisdiction requires the activity done by the protestors to directly affect the harm sought to be avoided, the climate change litigant has a difficult burden to meet. First, if the court interprets this requirement to mean that a protestor's actions will completely

230. *See* Long & Hamilton, *supra* note 25, at 96–104.

231. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 20–26, State v. Klapstein, 15-CR-16-413.

232. Transcript of Hearing at 60, State v. Taylor, No. 6Z0117975.

stop climate change altogether, then the necessity defense will never be available to climate change protestors.[233]

However, if the court only interprets the requirement to mean that a protestor's actions will contribute to slowing climate change, then meeting this burden is possible.[234] For example, in *Klapstein*, the defendants argued that each incremental effect on halting climate change is progress, and their activity, by stopping the production of pipelines for the brief period of time, directly slowed down the effects of climate change.[235] In addition, they argued that their actions would lead to executive policy changes, which seems to be the more convincing argument.[236] The court found the argument persuasive, as it allowed the case to go to a jury. As a result, it seems that to effectively meet this difficult burden, attorneys should argue that any effect, no matter how small, abstract, or policy driven, on the impact of climate change is enough to satisfy the causal relationship requirement of the necessity defense.

6. Emphasize the Peaceful Manner in Which the Defendant Acted

By avoiding unnecessary harm and being respectful of authority figures when they inevitably appear during a protest, the defendant provides a nice piece of factual support for the attorney when arguing in motion papers, hearings, or at trial, that his or her client had a specific motive and was not attempting to go beyond the stated purpose of trying to halt the threat of climate change.

7. Implicate the Public Trust Doctrine and Constitutional Rights

Finally, attorneys should try and implicate the public trust doctrine and constitutional rights when possible. One district court determined that "the right to a climate system capable of

233. *See* Hernández, *supra* note 7, at 320 (To have any chance to meet this burden, the protestors would need to "violate laws that have the direct effect of harming the environment in order to avail themselves of the necessity defense's potential.").

234. Scholars have also argued that courts should not even be looking for definitive proof in these cases. *See* Long & Hamilton, *supra* note 25, at 89.

235. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 25–26, State v. Klapstein, 15-CR-16-413; *see also* Long & Hamilton, *supra* note 25, at 88–9.

236. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 26–27, State v. Klapstein, 15-CR-16-413.

sustaining human life is fundamental to a free and ordered society."[237] By doing so, the court was recognizing a due process right to a clean environment for individuals.[238] In addition, the court recognized the public trust doctrine at the federal level and climate change's harm to public resources.[239]

What these determinations by the Oregon District Court do for the necessity defense case are as follows: the constitutional injury adds weight to the harm climate change protestors are trying to avert;[240] and "the utter and decades-long failure of government actors to fulfill their [public] trust duties and to protect constitutionally-protected interests in a healthy climate underscores why traditional legal avenues are insufficient to address the climate crisis."[241] Although it is unclear that all circuits or states will follow the logic of this one district court, it does not hurt to add the argument to bolster one's argument when attempting to meet the difficult burden of asserting the necessity defense in a climate change civil disobedience case.

237. Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). The appellate history of this case is long and detailed. *See Juliana v. United States*, SABIN CTR. FOR CLIMATE CHANGE L.: CLIMATE CASE CHART, http://climatecasechart.com/case/juliana-v-united-states/ [https://perma.cc/Y4ES-VBRF] (last visited Apr. 22, 2019); *Details of Proceedings*, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/federal-proceedings/ [https://perma.cc/Q6PL-NJ8Q] (last visited Apr. 22, 2019). The trial is currently stayed pending numerous appeals to the Ninth Circuit. *See Juliana v. United States*, SABIN CTR. FOR CLIMATE CHANGE L.: CLIMATE CASE CHART, *supra* note 237.

238. Brief of Law Professors and Legal Education Organizations as Amici Curiae in Support of Respondents at 25, State v. Johnston, No. A17-1649 (Minn. App. Dec. 4, 2017); Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 30, State v. Klapstein, 15-CR-16-413.

239. Brief of Law Professors and Legal Education Organizations as Amici Curiae in Support of Respondents at 25, State v. Johnston, No. A17-1649; Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 30, State v. Klapstein, 15-CR-16-413; *see also* Brief for Climate Defense Project as Amicus Curiae Supporting Petitioners at 9–13, Washington v. Brockway, No. 76242-7-I (Wash. Ct. App. Nov. 17, 2017).

240. Brief of Law Professors and Legal Education Organizations as Amici Curiae in Support of Respondents at 26, State v. Johnston, No. A17-1649; Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 31, State v. Klapstein, 15-CR-16-413.

241. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 31, State v. Klapstein, 15-CR-16-413; *see also* Brief of Law Professors and Legal Education Organizations as Amici Curiae in Support of Respondents at 26, State v. Johnston, No. A17-1649.

CONCLUSION

The fight against climate change is an uphill battle that has gotten tougher due to the current administration. Thus, to combat the inevitable effects of a warming climate, it will take the concerted and creative effort of attorneys worldwide to come up with solutions in spite of the many legal obstacles. One such solution is the use of the necessity defense.

The purpose of this Note is not to make climate change litigants believe that asserting the necessity defense will be easy. On the contrary, as there have been twenty-eight cases that have tried to use this defense, and only four have had any success,[242] it is clear that its use is extremely difficult. This Note aims to provide helpful background material, case law, analysis, and guidance for attorneys wishing to use the necessity defense in climate litigation, specifically in cases of climate change civil disobedience.

This Note makes the point that, if courts begin to accept the necessity defense, it is one tool, of many, that could be used to stop a complex and multifaceted issue such as climate change. Like the Supreme Court has made clear in *Massachusetts v. EPA*, "massive problems" cannot be resolved in "one fell regulatory swoop;" instead, they require "small incremental steps."[243] This Note hopes to be one of those "small incremental steps."

242. CASE GUIDE, *supra* note 74.
243. Massachusetts v. EPA, 549 U.S. 497, 524 (2007).